NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTONIO VALDIVIA-PADILLA, Petitioner, v. ALBERTO R. GONZALES, Attorney General, Respondent.	No. 03-71967 Agency No. A75-184-619 MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued & Submitted November 3, 2004
San Francisco, California

Before: REINHARDT, THOMPSON, and BERZON, Circuit Judges.

Antonio Valdivia-Padilla ("Valdivia"), native and citizen of Mexico, petitions for review of the Board of Immigration Appeals ("BIA")'s denial of his motion to reopen his immigration proceedings on the ground of ineffective assistance of counsel. The BIA held that, because the Attorney General's

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repapering regulations "are proposed and are not yet final," Valdivia failed to show prejudice as a result of his prior counsel's failure to notify the Board of his eligibility for such administrative action. In November 2004, this court vacated submission of Valdivia's petition for review pending the BIA's resolution of *Alcaraz v. INS*, 384 F.3d 1150 (9th Cir. 2004). On September 6, 2005, the BIA issued its decision in *Alcaraz*, in which it concluded that the BIA may administratively close cases pending before it where the alien meets the criteria for repapering[1] *pending* the Attorney General's publication of a regulation to implement the repapering provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 309(c)(3), 110 Stat. 3009-626 (1996).[2] *See In re Alcaraz*, No. A74 427 891 (B.I.A. Sept. 6, 2005).

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[1] An alien qualifies for repapering if he (1) is not a lawful permanent resident, (2) is not subject to a final administrative order, (3) would be eligible for suspension of deportation under former section 244(a) of the INA but for the application of the stop-time provision in INA section 240A(d)(1), and (4) is eligible for cancellation of removal under section 240A(b) of the INA. *See* Memorandum of Lori L. Scialabba, Vice Chair of the BIA, dated March 14, 2000 ("*Scialabba Memorandum*"), *available at* http://www.usdoj.gov/eoir/chip6.pdf; *see also Alcaraz*, 384 F.3d at 1154-55.

[2] Section 309(c)(3) of IIRIRA authorizes the Attorney General to provide aliens rendered ineligible for suspension of deportation because of IIRIRA's retroactive stop-time rule an opportunity to apply for cancellation of removal. *See Alcaraz*, 384 F.3d at 1152-54.

In light of the BIA's decision in *Alcaraz*, we conclude that the BIA erred in denying Valdivia's motion on the ground that the Attorney General had not yet published a final rule. Furthermore, while it is generally true that the BIA will not reopen cases simply to administratively close them, here there is an independent basis for reopening – ineffectiveness of counsel. Once a case is reopened on an independent ground, there is no longer a final administrative order as the case is again heard on the merits.[3] *See Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (order). Therefore, upon reopening, the BIA may administratively close Valdivia's case.[4] Finally, the government's argument that Valdivia's failure to comply with voluntary departure renders him ineligible for relief is without merit. Valdivia's voluntary departure is governed by 8 U.S.C. § 1252b(e)(2)(A) (1995) (repealed 1996), and because there is no evidence in the record that Valdivia received either written or oral notice of the consequences of violating one's

[3] "The INS should not agree to join a motion to reopen a proceeding solely for the purpose of administrating closing under this memorandum. However, once a proceeding is reopened on an independent basis, the alien may request administrative closure . . . ." Memorandum of Bo Cooper, General Counsel for the INS, dated Dec. 7, 1999 ("*Cooper Memorandum*"), *available at* http://www.usdoj.gov/eoir/chip4.pdf.

[4] IIRIRA § 309(c)(3) provides, in part, that "the Attorney General may elect to terminate proceedings in which there has not been a final administrative decision . . . ."

voluntary departure period as required by that statute, his failure to depart is not a bar to future immigration relief.[5] *See Ordonez v. INS*, 345 F.3d 777, 784 (9th Cir. 2003). For these reasons, we hold that the BIA abused its discretion in denying Valdivia's motion to reopen.[6]

Accordingly, we **GRANT** Valdivia's petition and **REMAND** to the BIA with instructions to grant the motion to reopen and to exercise its discretion regarding whether to administratively close the case for repapering.

[5] 8 U.S.C. § 1252b(e)(2)(B) (1995) (repealed 1996) provides, "Subparagraph (A) [listing bars for failing to depart] shall not apply to an alien allowed to depart voluntarily unless, before such departure, the Attorney General has provided written notice to the alien in English and Spanish and oral notice either in the alien's native language or in another language the alien understands[,] of the consequences under subparagraph (A) of the alien's remaining in the United States after the scheduled date of departure . . . ."

[6] Because we reverse on this ground, we consider only Valdivia's motion to reopen and not his motion to reconsider.